UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ARIELLE T. FIFE
SEAMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 201000412
SPECIAL COURT-MARTIAL

Sentence Adjudged: 31 March 2010.
Military Judge: CAPT Carole Gaasch, JAGC, USN.
Convening Authority: Commanding Officer, Training Support Center, San Diego, CA.
For Appellant: Maj Richard Belliss, USMCR.
For Appellee: Maj Elizabeth Harvey, JAGC, USN.

10 May 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to her pleas, of one specification of failure to go, one specification of violation of a lawful general order, two specifications of violation of lawful orders, and two specifications of making false official statements, in violation of Articles 86, 92, and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, and 907. The appellant was sentenced to five months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority suspended all confinement in excess of 90 days and, except for the punitive discharge, ordered the sentence executed.

The appellant submitted three assignments of error: (1) that this court is without jurisdiction because the convening authority disapproved the bad-conduct discharge; (2) that the military judge abused her discretion by permitting a witness to testify in aggravation without a sufficient foundation; and (3) that the military judge committed plain error by permitting a witness to testify in aggravation beyond the limits of RULE FOR COURTS-MARTIAL 1001(b)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant received nonjudicial punishment and was placed on restriction, with additional restriction suspended. During the suspension period, additional misconduct led to the vacation of the suspension. While serving restriction, the appellant failed to go to a restricted muster. She left the restricted barracks after hours without permission, smoked Spice, invited a male friend to her room, engaged in consensual intercourse with him, and falsely reported the encounter as rape to two different officials, including an agent from the Naval Criminal Investigative Service.

In taking initial action, the convening authority's action included language that stated, in pertinent part:

> . . . the sentence as adjudged is approved, except for that part of the sentence extending to a bad-conduct discharge, will be executed, but the execution of that part of the sentence adjudging confinement in excess of ninety (90) days is suspended. . . ."

Convening Authority Action dated 20 Jul 2010.

The appellant submitted the above mentioned assignments of error, claiming that the language used by the convening authority clearly and unambiguously disapproved the punitive discharge, mandating return of the record to the Judge Advocate General with direction to forward the record for review under R.C.M. 1112. By order dated 20 December 2010, we instead returned the record to the Judge Advocate General for remand to the convening authority with direction that the convening authority withdraw his action of 20 July 2010 and substitute a corrected action. The record is once again before us without additional assignments of error.

Analysis

When the action of a convening authority is ambiguous, we may instruct the convening authority to withdraw the original action and substitute a corrected action. R.C.M. 1107(g). As the Government correctly notes, an ambiguous action is one which

is open to two or more possible understandings. *United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981).

The action in this case was ambiguous, as the word "and" was missing from the sentence at issue. The effect of the action would take two entirely different courses depending on the placement of the missing word. In the first, the discharge would have been approved had the action said "approved, ***and*** except for the bad-conduct discharge, will be executed. . ." In the second, the discharge would have been disapproved had the action instead said "approved, except for the bad-conduct discharge, ***and*** will be executed . . . ." As drafted, the sentence was both grammatically incomplete and ambiguous. For that reason, we returned the record for substitute action.

The record now before us includes an unambiguous action dated 7 February 2011 approving the sentence as adjudged, suspending confinement in excess of 90 days, ordering the sentence executed, and noting that the punitive discharge will be executed only after final judgment. The appellant's first assignment of error is therefore moot.

Before considering the second assignment of error, we note that the substitute action states that "[i]n accordance with the [UCMJ], the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment." To the extent that this language purports to direct anything, it is a legal nullity. Article 71 is restrictive in its wording (a discharge "may not be" executed until after final action). It is not, as is the language of the substitute action, directive ("will be executed"), as the determination as to whether a discharge "will be" executed cannot be made until after judgment as to the legality of the proceedings, and, in case of death or dismissal, approval under Article 71(a) or (b). The better practice would be to mirror the language of the statute (although that construct would add nothing legally to the action), or to follow the recommended forms for action in Appendix 16 of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The appellant's remaining assignments of error stem from the presentencing testimony of Chief K, the leading chief petty officer for the unit to which the appellant was assigned pending resolution of her disciplinary issues. Chief K testified that he saw the appellant beginning in mid-December 2009, prior to at least some of the offenses to which she pleaded guilty in this court-martial, and leading up the trial on 31 March 2010. He saw her at musters, on job sites, and counseled her on more than one occasion. He further testified that he sat down with her following her nonjudicial punishment to explain to her what he expected of her, that he had been involved in her disciplinary review board and that he has the chance to see "her working or,

in some cases, not working." When asked if he had the chance to form an opinion of the appellant's rehabilitative potential, Chief K replied affirmatively.

After the defense counsel objected to further testimony from Chief K because it lacked sufficient foundation, the military judge responded by saying "I'm capable of giving it the weight it's due." Record at 102. Chief K then stated that the appellant had no potential, and that "there's no place for her . . . ." At that point the military judge interrupted Chief K, clarifying for him that the question addressed the appellant's potential in society, not for further service. *Id*. Chief K then testified that with time, the appellant might rehabilitate herself, but that what was required was time that the military could not give her. Again, the military judge inserted herself, saying "Again, you need to . . ." *Id*. at 103. The trial counsel immediately tried to refocus Chief K before the military judge completed her sentence, and elicited testimony that the appellant needed to grow up, needed a mentor, and needed time to learn life skills that she currently lacked. There were no further objections from the defense. *Id*.

We review a military judge's decision to admit or exclude testimony over a defense objection for an abuse of discretion. An abuse of discretion occurs when the findings of fact upon which the judge predicates his ruling are not supported by the evidence of record, if the judge employed incorrect legal principles, or if his application of the correct legal principles to the facts was clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010). In the absence of objection, we review a decision to admit presentencing evidence for plain error, an error that was plain or obvious, and one that materially prejudiced the substantial rights of the appellant. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

A proper foundation for rehabilitative potential testimony can be established by showing that the witness has a personal opinion based on observations. The witness must have relevant information and knowledge that relates to the appellant's personal circumstances. An opinion as to rehabilitative potential is limited to potential to be restored to a useful and constructive place in society, and a statement as to the magnitude of that potential. Only opinions that are rationally based on personal knowledge about the appellant's character, performance of duties, moral fiber, and determination to be rehabilitated meet this standard. *Ellis*, 68 M.J. at 345; *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); R.C.M. 1001(b)(5).

Here, Chief K met those foundational standards, having observed the appellant over a four-month period, to include seeing how she responded to his initial counseling after an earlier disciplinary infraction. The military judge was aware of the limits of Chief K's knowledge and of the limits of his

permissible testimony, as demonstrated by her statements that she would give the testimony the weight it was due, and by her *sua sponte* statements that Chief K's testimony exceeded the scope of permissible opinion. Given her statements, we presume that the military judge did exactly what she stated by giving Chief K's testimony the weight it was due and nothing more, and that any comments made by Chief K that exceeded the limits of admissibility had no impact on the judge. *See Ellis*, 68 M.J. at 347; *United States v. Robbins*, 52 M.J. 455 (C.A.A.F. 2000).

Conclusion

The findings and sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court